U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 170
March - April 2004

John M. Vittone
Chief Judge

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

DOL Proposes Rules for Insurance Carriers Providing Coverage Under Longhore Law

Certain insurance carriers authorized by the Labor Department to provided coverage to employers covered under the LHWCA will have to make security deposits with the agency to cover their workers' compensation claims in the event of default or insolvency, according to proposed rules scheduled for publication in the March 15 Federal Register.

The proposed rules would apply "only where there is no adequate state guaranty fund" and require that security deposits simply "reflect the actual risk of loss," according to the Employment Standards Administration. The rules, which are open for comment for 60 days from publication in the Federal Register, would establish the process by which DOL's OWCP will determine the amount of security deposits necessary to secure an insurance carrier's obligations under the longshore law. The rules also apply to employers that self-insure and require that they post security deposits in amounts sufficient to secure their future claim liabilities.

DOL's Division of Longshore and Harbor Workers' Compensation was prompted in part to revisit the issue of securing obligations under the longshore law by an increased rate of insolvency among insurance carriers over the past three years, the number of insurance carriers with falling financial security ratings, and the industry wide impact of the losses resulting from the September 11, 2001 terrorist attacks according to the proposed rules. The agency actually has been requiring authorized insurance carriers to post security deposits since 1990.

Documents published in the Federal Register can be accessed on the Internet at: http://www.gpoaccess.gov/fr/index.html. The Web site's option to "browse the table of contents" includes links to published material.

Consolidation of the Longshore Program in the Chicago Region of the OWCP

Effective April 1, 2004, the operation of the Longshore Program in the Chicago Region of the OWCP was restructured. The Longshore Tenth compensation District, with the district office located in Chicago, Illinois was consolidated into the Longshore Eight Compensation District, with the district office located in Houston, Texas. Effective with this change, the Longshore Eighth compensation District Office in Houston has jurisdiction over past and future cases under the LHWCA and its extensions arising in the States of Minnesota, Wisconsin, Michigan, Ohio, Indiana, Illinois, Iowa, Missouri, Kansas, and Nebraska. The official notice can be found at http://www.dol.gov/esa/owcp/dlhwc/lsindustrynotices/industrynotice115.htm.

ILA and Port Employers Reach Agreement With Six-Year Contract

A tentative agreement was reached for a six-year contract which covers 15,000 East and Gulf Coasts workers. This contract will provide four pay raises over six years. The two-tier wage scale system of the present contract will also be a part of the new contract. This agreement includes "ro-ro" (roll-on, roll-off) cargo workers and containerized vessels. Break and break-bulk cargo workers are covered by local contracts which are still being negotiated.

A. Circuit Courts of Appeals

Newport News Shipbuilding & Dry Dock Co. v. Firth ___ F.3d ___ (No. 99-1892)(**4th Cir.** April 5, 2004).

The **Fourth Circuit** held that an employer cannot obtain Section 8(f) relief if it does not comply with mandatory procedural requirements. When the claimant filed a request for an informal conference to determine his eligibility for permanent partial disability benefits, the district director scheduled the conference. However, Newport News responded by requesting that the conference be cancelled and that the matter be transferred to OALJ for a formal hearing "since this is not a matter which can be resolved at [OWCP]."

Once before the ALJ, Newport News informed the judge that the only remaining issue to be determined was Newport's entitlement to relief from continuing liability under Section 8(f). In that regard, the Director did not contest that the employer qualified on the merits for Section 8(f) relief. However, the Director argued that the absolute defense

contained in Section 8(f)(3) should be invoked since the employer, knowing of the permanency of the claimant's condition, failed to present its Section 8(f) claim to the Director while the claim was before the Director and prior to the time the Director transferred the case to OALJ.

The **Fourth Circuit** found that it must adhere to the plain and unambiguous language of the statute which "provides an explicit scheme for obtaining a benefit… ."

[Topic 8.7.9.2 Special Fund Relief—Timeliness of Employer's Claim for Relief]

Howard v. S. Illinois Riverboat Casino Cruises, Inc., ___ F.3d ___ (No. 02-3818, 02-3819)(**7th Cir.** April 9, 2004).

The **Seventh Circuit** held that an indefinitely moored dockside casino with no transportation function or purpose is not a "vessel in navigation" and therefore the plaintiffs are not entitled to Jones Act status. The casino had been docked for over a year and was connected to land-based utilities, including electricity, telephone, water, and sewer. Nevertheless it could be disconnected from the dock in about 15 to 20 minutes and was licensed and classified as a passenger vessel with the U.S. Coast Guard. It employed a captain and crew qualified to move the casino if necessary.

The court found that in order for a vessel to satisfy the navigation requirement of the *Chandris* test, the purpose of the vessel "must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters." The court further noted that while a factor to take into account is whether a ship is a vessel for state law gambling purposes, this factor does not govern the question of whether it is a vessel in navigation for purposes of the Jones Act. Citing to several cases, the court noted that courts will need to examine, among other factors, the current use of the vessel and the question "whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary."

[Topics 1.4.3 Jurisdiction/Coverage—"Vessel," 1.4.3.1 Floating Dockside Casinos]

Cooper/t. Smith, Inc, v. Veles, (Unreported)(No. 03-60809)(**5th Cir.** March 17, 2004); 2004 U.S. App. LEXIS 5077.

In this Section 20(a) presumption case, the employer faulted the ALJ for preferring the testimony of treating physicians over the respondent's expert witness and for crediting the claimant's testimony with respect to the difficulties caused by his knee and back. However, the **Fifth Circuit** found that the ALJ's findings were supported by substantial evidence, and that the Board acted properly in refusing to gainsay them. The court found that although the respondents pointed to the employer's physician's doubts that the back injury flowed from the claimant's limp, and also pointed to the claimant's "hypersensitivity" to pain, it was within the ALJ's purview to exercise his judgment in

evaluating witnesses' credibility and in assembling the evidence presented to him. "Merely because different determinations of credibility could have led to different conclusions, does not mean that the ALJ's fact finding was unsupported by substantial evidence."

[Topics 20.4.1 Presumptions—Evidence Based on Record as a Whole; 23.5 Evidence—ALJ Can Accept Or Reject Medical Testimony]

[ED. NOTE: The following case is included for informational value only.**]**

Hardman v. Barnhart, Commissioner, Social Security Administration, ___ F.3d ___ (No. 03-7056)(**10th Cir.** March 30, 2004).

In this Social Security case, the ALJ was reversed for relying on standard boilerplate language in accessing the claimant's credibility. In addressing the claimant's allegations of disabling pain, the ALJ had recited boilerplate language stating that full consideration had been given to the claimant's subjective complaints. Then the ALJ rejected the claimant's allegations of pain and limitation using more boilerplate language that:

> Claimant's allegations are not fully credible because, but not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by the claimant at the hearing.

The **Tenth Circuit** noted that it had previously held that this boilerplate was insufficient in the absence of a more thorough analysis, to support the ALJ's credibility determination as required by case law. "The boilerplate language fails to inform us in a meaningful, reviewable way of specific evidence the ALJ considered in determining the claimant's complaints were not credible….More troubling, it appears that the Commissioner has repeatedly been using this same boilerplate paragraph to reject the testimony of numerous claimants, without linking the conclusory statements contained therein to evidence in the record or even tailoring the paragraph to the facts at hand almost without regard to whether the boilerplate paragraph has any relevancy to the case….As is the risk with boilerplate language, we are unable to determine in this case the specific evidence that led the ALJ to reject claimant's testimony." The court went on to note that it was error for the ALJ to fail to expressly consider the claimant's personal attempts to find relief from his pain, his willingness to try various treatments for his pain, and his frequent contact with physicians concerning his pain-related complaints.

[Topics 19.3.5 Procedure—ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon; 19.4 Procedure—Formal Hearings Comply with APA]

O'Neil v. Bunge Corp., ___ F.3d ___ (No. 02-71248)(**9th Cir.** April 23, 2004).

The **Ninth Circuit** held that when a claimant enters into an "agreement" with his employer to settle a case, but passes away prior to signing the settlement agreement, there is no enforceable Section 8(i) settlement agreement. The **Ninth Circuit** found that the Section 8(i) implementing regulations, 20 C.F.R. §§ 702.241 to 702.243, are clear on their face: a settlement is contingent upon the submission of a **signed** settlement application.

[Topic 8.10.3 Section 8(i) Settlements—Structure of Settlement]

B. Federal district courts

Hebert v. Pride International, (Unpublished) (Civ. No. 03-0804)(E. D. La. March 5, 2004); 2004 U.S. Dist. LEXIS 3436.

This OCS summary judgment matter dealt with whether a worker was a borrowed employee making his exclusive remedy workers' compensation benefits under the LHWCA. Noting **Fifth Circuit** case law, the federal district court listed the nine factors a court must consider in making a borrowed employee determination.

[Topics 2.2.16 Definitions--Occupational Diseases and the Responsible Employer/Carrier—Borrowed Employee Doctrine; 4.1.1 Compensation Liability—Contractor/subcontractor Liability; 5.1.1 Exclusiveness of Remedy and Third Party Liability; 60.3.1 Outer Continental Shelf Lands Act—Applicability of the LHWCA]

Autin v. Nabors Offshore Corp., (Unpublished)(Civ. No. 0203704)(E.D. of La. March 5, 2004), 2004 U.S. Dist. LEXIS 3507.

Here a worker's status as either a Jones Act seaman or as a maritime worker covered by the LHWCA was at issue. The employer contended that in evaluating seaman status, the court must consider only the plaintiff's work on a fixed platform. In contrast, the plaintiff argued that his career with the employer did not involve a termination and re-hire, but rather a transfer, and thus the status question must be resolved in the context of his entire two-plus years employment at employer, largely in a seaman's capacity.

The employer filed a Motion to Compel Arbitration and Alternatively, for Summary Judgment. The judge denied both motions noting that the matter was not subject to arbitration:

> Plaintiff's claim is either under the Jones Act or the LHWCA. By law, Jones Act claims are not subject to arbitration. Brown v. Nabors Offshore Corp., 339 F.3d

391 (5th cir. 2003). Moreover, LHWCA claims are specifically excluded from arbitration by the very terms of the [employer's] DRP ("notwithstanding anything to the contrary in this Program, the Program does not apply to claims for workers' compensation benefits.") Accordingly, there is no possible scenario under which plaintiff's claims are subject to arbitration. **[*ED. NOTE:* *Although it has not been litigated as to whether a contractual agreement can specifically exclude a longshore claim from ADR as a public policy, the question is mooted nevertheless since all parties to a claim must request the appointment of a settlement judge at OALJ*.]**

Summary judgment was denied since there remain outstanding fact issues.

[Topic 8.10.12 Section 8(i) Settlements—Alternative Dispute Resolution]

Desoto v. Pride International, Inc., (Unpublished) (No. Civ. A 03-1868)(E.D. La. March 3, 2004).

Here a Motion for Summary Judgment was granted to the defendants because the claimant was injured on a fixed platform located within the territorial waters of Mexico, within the Gulf of Mexico. The plaintiff was injured by a falling crate while employed as a crane operator and motorman mechanic aboard a drilling rig. The plaintiff alleged federal question jurisdiction and in an amended complaint relied upon the general maritime law of the United States ("GML") and the OCSLA. The fact that the accident occurred on a fixed platform in Mexican territorial waters was uncontested. Since the Fifth Circuit has previously held that an injury on a fixed platform does not fall within the admiralty and maritime jurisdiction, the district court found that the GML does not support federal question jurisdiction. The court further found that the OCSLA was inapplicable since the OCSLA provides that "the soil and seabed of the outer continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition." Thus, the claim was outside the scope of the OSCLA. (*Cf. Weber v. S.C.Loveland Co. (Weber II), 35 BRBS 75 (2001)(Claimant injured in the port of Kingston, Jamaica, while walking on employer's catwalk on barge, was covered under the LHWCA.)*

[Topics 1.5.2 Jurisdiction/Coverage—Navigable Waters; 60.3.1 Outer Continental Shelf Lands Act—Applicability of the LHWCA]

C. Benefits Review Board Decisions

Newton v. P & O Ports Louisiana, Inc., ___ BRBS ___ (BRB No. 04-0200) ((March 11, 2004).

Here the Board granted the claimant's Motion to Dismiss the employer's appeal of the ALJ's interlocutory order since (1) the case does not raise any due process considerations; (2) the employer did not allege that the documents the claimant sought to discover constituted privileged materials; (3)there was no undue hardship since the evidence the claimant sought to recover was already in existence; and (4) the ALJ is afforded broad discretion in authorizing discovery and the interlocutory order will be reviewable after a final decision is issued in this matter.

In this matter, the claimant's claim for benefits is pending before the district director. The claimant had filed a motion with the ALJ seeking enforcement of a subpoena that the ALJ had issued. The subpoena had called for the employer to disclose the names and addresses of the companies identified as potential suitable alternate employment by the employer's vocational expert." The employer had resisted on the ground that it is not required to disclose this information, and it filed motions to quash the subpoena and for a protective order.

The ALJ had found that the employer was confusing the standard for establishing suitable alternate employment with the standard for what is discoverable material. The ALJ had found that under 29 C.F.R. § 18.14, the parties may obtain discovery regarding any matter which is not privileged and which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. The ALJ found that while the employer is not obligated to produce its evidence of suitable alternate employment at the hearing, its vocational evidence is nonetheless discoverable in that the claimant is entitled "to test the quality of the employer's vocational evidence." Thus, the ALJ found that the information sought by the claimant is relevant notwithstanding that the claimant's attorney is familiar with the vohab person's qualifications and methodology. The ALJ had further found that the information was not privileged and therefore denied the employer's motions to quash and for a protective order; and granted the claimant's motion to compel.

It is noteworthy that the Board did not find it necessary to refer to the ALJ's inherent authority to enforce discovery while a claim is pending with the district director. *See Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986)(*en banc*).

[Topic 19.3.6.2 Procedure—Discovery; 27.2 Powers of ALJs--Discovery]

Mabile v. Swiftships, Inc., ___ BRBS ___ (BRB No. 03-0424)(March 11, 2004).

The Board affirmed the ALJ's finding that Section 33(g) does not bar a widow's claim for death benefits although she entered into a third-party settlement after the death of her husband where she was only settling the decedent's tort action for his pain and suffering and economic loss, which remained pending at the time of his death. The Louisiana court had dismissed all of the claims that the widow filed in her own right, specifically holding that only the claims for the decedent's lost wages and pain and

suffering could go forward. Thus, the widow obtained the proceeds of the third-party settlement with the employer's officers only because she was substituted for her husband as a representative of his estate and not because she surrendered any of her own rights. Therefore she was not a "person entitled to compensation" for the decedent's pain and economic loss.

The Board explained that in this case, although the decedent's disability claim and the widow's death benefits are based on the same occupational exposure, they are separate claims for distinct types of benefits. As the widow's claim is for death benefits under the LHWCA, and the settlement is solely based on the decedent's lost wages and pain and suffering during his life, the third party was not liable for the same disability or death for which the widow sought benefits under the LHWCA. "Where, as here, the claimant does not have the right to seek damages from the third party for her own benefits, then employer does not have the right, under Section 33(b), to seek damages on the death claim from that third party."

[Topics 33.2 Compensation for Injuries Where Third Persons Are Liable--Assignment of Rights; 33.7 Ensuring Employer's Rights—Written Approval of Settlement—Qualifying for Benefits (Person Entitled to Compensation)]

Schultz v. United States Marine Corps/MWR, (Unpublished)(BRB No. 03-0473)(March 17, 2004).

A motion to correct clerical errors in a settlement order, such as where an ALJ merely recited the wrong monetary figures to which the parties had agreed, does not toll the time for filling a notice of appeal of the underlying compensation order.

[Topics 8.10.8 Section 8(i) Settlements—Finality of Settlement; 21.1.1 Review Of Compensation Order—Composition and authority of BRB]

Pope v. Ham Industries, Inc. (Unpublished)(BRB NO. 03-0476)(April 2, 2004).

A claimant suffering a loss in wage-earning capacity, who is terminated for misfeasance, from a light-duty suitable alternate employment position is nevertheless still entitled to the continuation of any partial disability benefits to which she was entitled prior to her termination. The Board held that the claimant's termination did not sever the employer's liability for continuing partial disability benefits based on the loss in earning capacity existing at the time of termination.

[Topic 8.2.4 Partial Disability/Suitable Alternate Employment]

Singleton v. National Maintenance & Repair, (Unpublished) (BRB No. 03-0404)(March 10, 2004).

The Board reversed an attorney fee award where after the formal hearing the employer paid less compensation (for injuries to the left and right upper extremities) than it was voluntarily paying before the hearing. While acknowledging that the percentage for one extremity had been increased as a result of the formal hearing, the Board noted that the percentage for the other extremity had drastically decreased. Thus the claimant did not receive greater overall compensation after the hearing.

[Topics 28.1.2 Attorney's Fees—Successful Prosecution; 28.2.2 Employer's Liability—Tender of Compensation; 28.2.4Employer's Liability—Additional Compensation]

D. Other Jurisdictions

Tsaropoulos v. The State of New York, ___ N.Y. App. Div. ___ (No. 3080)(April 13, 2004); 2004 N.Y. App. Div. LEXIS 4074.

The court in this Section 905 case notes the historical changes that affected third party recover from vessel owners after the 1972 amendments to the LHWCA. [After the 1972 amendments, workers covered under the LHWCA could only recover from vessel owners under a negligence standard; the "seaworthiness" standard—a much more liberal standard--had been replaced.]

[Topic 1.5.1 Jurisdiction/Coverage—Development of Jurisdiction/Coverage]

[ED. NOTE: *The following case is included in the materials for informational value only.****]***

Hart v. District of Columbia Dep't of Employment Servs. (Unreported) (D.C. No. 02-AA-37)(March 4, 2004).

A "professional" wrestler' who had a single match in the District, wherein he suffered career-ending injuries, did not have sufficient contacts with the District to come within its workers compensation statute. Not even his television appearances nor the sale of his action figure in the District could help Bret "The Hitman" Hart. He was still considered to be working in the district temporarily or intermittently.

II. Black Lung Benefits Act

Circuit Courts of Appeals

In *Soubik v. Director, OWCP*, ___ F.3d ___, Case No. 03-1668 (3rd Cir. Apr. 30, 2004)[1], the court stated that its decision in *Hillibush v. Dep't. of Labor*, 853 F.2d 197, 205 (3rd Cir. 1988) provides that the survivor may prove her claim using "medical evidence alone, non-medical evidence alone, or the combination of medical and non-medical evidence . . .." Thus, *Hillibush* required that the ALJ consider lay evidence in determining whether the miner had a pulmonary or respiratory impairment, but "[e]xpert testimony will usually be required to establish the necessary relationship between . . . observed indicia of pneumoconiosis and any underlying pathology." As a result, the court determined that it was error for the ALJ to accord less weight to a medical opinion because it was based, in part, on lay evidence.

The court also held that the ALJ erred in finding no pneumoconiosis based on the medical opinion of Dr. Spagnolo, where the parties agreed that the disease was present. Citing to *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002), the Third Circuit agreed that "an ALJ may not credit a medical opinion stating that a claimant did not suffer from pneumoconiosis causing respiratory disability after the ALJ had already accepted the presence of pneumoconiosis unless the ALJ stated 'specific and persuasive reasons' why he or she relied upon such an opinion." In this case, the ALJ did not offer "specific and persuasive reasons" for crediting Dr. Spagnolo's opinion.

Dr. Spagnolo also opined that, even if the miner suffered from pneumoconiosis, it would not have hastened his death. The court stated the following with regard to considering Dr. Spagnolo's opinion on the issue of causation:

> Common sense suggests that it is usually exceedingly difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's death if he/she does not believe it was present. The ALJ did not explain why Dr. Spagnolo's opinion was entitled to such controlling weight despite Dr. Spagnolo's conclusion that Soubik did not have the disease that both parties agreed was present.

Finally, the court held that the ALJ improperly accorded less weight to the treating physician's opinion that coal workers' pneumoconiosis was present. The court reasoned as follows:

> The ALJ stated that he did not credit Dr. Karlavage's opinion as that of a treating physician because Dr. Karlavage had only seen Soubik three times over six months. That was, of course, three more times and six months more than Dr. Spagnolo saw him. So easily minimizing a treating physician's opinion in favor of a physician who has never laid eyes on the

[1] While the case was pending on appeal, the court noted that the widow died and the executor of her estate, John Soubik, was substituted as the appellant.

> patient is not only indefensible on this record, it suggests an inappropriate predisposition to deny benefits. It is well-established in this circuit that treating physicians' opinions are assumed to be more valuable than those of non-treating physicians. *Mancia v. Director, OWCP*, 130 F.3d 579, 590-91 (3d Cir. 1997). The ALJ nevertheless ignored Dr. Karlavage's clinical expertise; an expertise derived from many years of diagnosing and treating coal miners' pulmonary problems. The ALJ did so without making any effort to explain why Dr. Spagnolo's board certification in pulmonary medicine was a more compelling credential than Dr. Karlavage's many years of 'hands on' clinical training.

[**stipulation; treating physician's opinion; assuming presence of pneumoconiosis; use of lay testimony**]

In *Howard v. Valley Camp Coal Co.*, Case No. 03-1706 (4th Cir. Apr. 14, 2004) (unpub.), the court held that, because of an intervening change in the law, Employer was not collaterally estopped from re-litigating the existence of pneumoconiosis in a survivor's claim where benefits were awarded in the miner's earlier claim. Specifically, the court noted that at the time benefits were awarded in the miner's claim pneumoconiosis could be established under any one of the four methods set forth at 20 C.F.R. § 718.202(a)(1)-(4). Subsequently, however, the court issued *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2003), which required that the fact-finder weigh evidence under all four methods together to determine the presence of pneumoconiosis. As a result, the court held that "the requirement of identicality of issues was not satisfied" in the survivor's claim due to this intervening change in the law.

In addition, the court upheld the ALJ's exclusion of certain exhibits offered by Claimant stating that she did not establish "good cause" for failing to exchange the exhibits with Employer at least 20 days prior to the scheduled hearing. In this vein, the court noted that Claimant's counsel argued before the ALJ that he was not aware that he had the exhibits and he was not aware that the exhibits "weren't already in the record." The court concluded that "[a]s a matter of law, this explanation, which was tantamount to an admission of inattentiveness, was insufficient to establish 'good cause' for failing to meet the deadline for exchange of documents not made part of the record before the district director."

[**intervening change of law and its effect on collateral estoppel; failure to establish "good cause" for complying with 20-day rule**]

In *Hill v. Peabody Coal Co.*, Case No. 03-3321 (6th Cir. Apr. 7, 2004) (unpub.), the Sixth Circuit held that a treating physician's notation on a death certificate that pneumoconiosis was a cause of the miner's death, without explanation, was insufficient to meet the standard at 20 C.F.R. § 718.205 (2001). The court reiterated its holding in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003) that treating physicians' opinions "get the deference they deserve based on their general power to persuade." Citing to the Fourth Circuit's decision in *Bill Branch Coal Corp. v. Sparks*,

213 F.3d 186, 192 (4th Cir. 2000), the Sixth Circuit determined that a physician's conclusory statement on a death certificate, without further elaboration, is insufficient to meet Claimant's burden as to the cause of death.

[**conclusory statement on death certificate insufficient to establish cause of death; treating physician's opinion**]

In *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, Case No. 03-1232 (4th Cir. Apr. 5, 2004) (unpub.), the court concluded that the ALJ properly used readings of Category 0/1 for studies conducted between 1988 and 1996 to find that opacities were present, but were insufficient in number to yield a positive interpretation of pneumoconiosis. However, the court further stated that, given the progressive nature of the disease, these earlier readings supported a finding that the miner developed the disease by the time of a March 1997 study, which produced a Category 1 interpretation. In this vein, the court also concluded that it was proper for the ALJ to accord greater weight to the interpretations of radiologists over interpretations offered by non-radiologists.

With regard to weighing the medical opinion evidence, the ALJ properly accorded less weight to the opinion of Dr. Forehand, who found that the miner was totally disabled due to smoking-induced bronchitis but failed to explain "how he eliminated (the miner's) nearly thirty years of exposure to coal mine dust as a possible cause" of the bronchitis. In affirming the ALJ, the court noted that "Dr. Forehand erred by assuming that the negative x-rays (underlying his opinion) necessarily ruled out that (the miner's) bronchitis was caused by coal mine dust . . .." Similarly, the court found that the ALJ properly accorded less probative value to Dr. Fino's opinion on grounds that it was "premised on discredited medical tests."

[**weighing chest x-ray and medical opinion evidence**]